Under the Ontario Human Rights Code, 1981

In the Matter of the Complaint made by Ms. Darlene Noffke, dated August 1st, 1986, alleging discrimination in employment on the basis of harassment and reprisal by McClaskin Hot House and Donald Carl McClaskin.

BOARD OF INQUIRY

Chairman: Frederick H. Zemans

Counsel:

The Human Rights Commission: Sharon Ffolkes-Abrahams
Anthony Griffen

The Respondents: Byron Loney

This Board of Inquiry was appointed pursuant to the provisions of section 37(1) of the Human Rights Code, 1981, S.O. 1981, c. 53 (hereinafter "the Code") to hear and decide the Complaint of Darlene Noffke, General Delivery, Maple, Ontario, alleging discrimination in employment on the basis of harassment and reprisal by McClaskin Hot House and Donald Carl McClaskin pursuant to sections 6(2), 6(3)(b) and 8 of the Code. The Complaint was signed on August 1st, 1986 with respect to employment during the months of April, May and June 1986. I was appointed to conduct this Board of Inquiry on May 8th, 1989 which is an unfortunate lapse of three years. Because of illness I was not able to hold the Board of Inquiry as agreed during the week of July 25th and the Inquiry was convened in Bancroft to hear evidence on October 16th, 1989.

The Development of Canadian Sexual Harassment Law:

In 1980, sexual harassment was first recognized as a form of sex discrimination under the old Ontario Code by a Board of Inquiry chaired by Owen Shime, in the influential decision of Bell and Korczak v. Ladas and the Flaming Steer Steak House Tavern Inc. (1980), 1 C.H.R.R.. D/155. Some of the principles emerging from this and subsequent decisions were codified in section 6, under which this complaint is brought.

Before embarking on a detailed discussion of the relevant legislation, it may be useful to examine the May 1989 Supreme Court of Canada decision in Janzen and Govereau v. Platy Enterprises Ltd. which overturned a decision of the Manitoba Court of Appeal and confirmed that sexual harassment in the workplace can be a form of sex discrimination in the absence of specific legislative provision for sexual harassment. The provision in question was the section of the Manitoba Human Rights Code which corresponds to section 4(1) of the Ontario Code. Both provisions prohibit discrimination on the basis of sex. It appears that general provisions such as those guaranteeing equal treatment with respect to employment without discrimination because of sex invite a developing approach to the issue of sexual harassment which may not be covered under legislation geared specifically to sexual harassment.

Hence, while the Supreme Court of Canada's decision is not directly applicable to section 6 of the Code, it may no longer be correct to assume that sexual harassment in Ontario begins and ends with section 6 of the Code. The Supreme Court of Canada's dicta appears to take a broader approach to sexual harassment than the provisions under section 6. Employment discrimination on the basis of sex

> may be defined as practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender. (page 28)

The Supreme Court specifically stated that sexual harassment:

> may be broadly defined as unwelcome conduct of a sexual nature that detrimentally effects the work environment or leads to adverse job-related consequences for the victims of the harassment. (page 33)

The Chief Justice, writing for the court, downplays the distinction made by some Canadian courts and human rights tribunals between "quid pro quo" and "hostile environment" sexual harassment. Instead, he writes:

> The main point of allegations of sexual harassment is that unwelcome sexual conduct has invaded the workplace.

Note also that in this general discussion of sexual harassment, the court made no mention of a requirement of reasonable knowledge by the perpetrator of unwelcome conduct.

As stated earlier, this complaint is brought pursuant to Code provisions 6(2) and 6(3)(b) which read as follows:

> 6.(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
>
> (3) Every person has a right to be free from, (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

It is to be noted that harassment is not defined in section 6 but rather in section 9(f) of the Code as "engaging in a course

of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome."

The legislation is straightforward with respect to a reprisal pursuant to the provisions of section 6(3)(b) which provide that prohibited conduct includes a reprisal or threat of reprisal for the rejection of a sexual solicitation or advance by an employer. Freedom from sexual solicitation or advance is not dependent upon the presence of tangible employment consequences. Where consequences in the form of reprisal or threat of reprisal do exist, an additional violation of the Code will have occurred. [Cuff v. Gypsy Restaurant (1987), 8 C.H.R.R. D/3972 (Ont. Board of Inquiry).] Unlike 6(2), 6(3)(b) has no knowledge or reasonable knowledge requirement.

As mentioned, sub-section 6(2) will apply to many of the circumstances previously dealt with through the concept of "poisoned work environment." Paragraph 4(1)(g) of the former Code was interpreted to mean that sexual harassment could give rise to a discriminatory condition of employment by poisoning the work environment of the employee. [See Coutroubis and Kekatos v. Sklavos Printing (1981), 2 C.H.R.R. D/457.]

In the Cuff v. Gypsy Restaurant decision, the Board gave the opinion that section 6(2) has codified the spirit of the poisoned work environment or discriminatory conditions of employment jurisprudence, while introducing a number of requirements which must be satisfied in order to find that an employee has been the subject of "harassment."

> These conditions are drawn from the definition of harassment in sub-section 9(f) and they are as follows:
> (a) a course of
> (b) vexatious
> (c) comment or conduct
> (d) that is known or ought reasonably to be known to be unwelcome.

Professor Bayefsky continues in the Cuff decision to discuss the four elements of harassment:

> "Course" suggests that harassment will require more than one event. There must be some degree of repetition of the "vexatious comment or conduct" in order to constitute harassment ...
>
> "Vexatious" is defined by the Concise Oxford Dictionary as "annoying" or "distressing: the verb to "vex" is defined by The Standard College Dictionary as "to irritate", "annoy". "trouble" or "agitate". The fact that the comment or conduct must be vexatious imports a subjective element into the definition of harassment: was the comment or conduct vexatious to this complainant? In considering this condition account should be taken of the personality and the character of the complainant; a shy reserved person, or in some cases a younger less experienced or more vulnerable person, is less likely to manifest her annoyance, irritation or agitation with the respondent's behaviour than a self-confident, extroverted individual.

In Hall v. Sonap Canada, [unreported, February 15th, 1989] Chairperson Plaut applied "vexatious" as follows:

> One has to look at the young, inexperienced and somewhat shy complainant who finds herself in a situation of innuendos and physical contact with a man who is older, is her boss and is in many ways socially and educationally much her superior. I have already indicated that I accept her [the complainant's] statement that she felt uncomfortable ... and for me that suffices to meet the test of this part of the phrase.

Professor Bayefsky in Cuff discusses in detail the meaning of "comment or conduct":

> "Comment or conduct" means that either form of action alone can give rise to harassment. The use of certain kinds of language can be sufficient to constitute harassment.
>
> ...
>
> In addition, the definition of harassment in subsection 9(f) makes no mention of the object of the "comment or conduct". In other words, it is conceivable for instance, that the comments may be directed toward persons other than the complainant.

After referring to the Ontario Divisional Court decision in Wei Fu v. The Queen [unreported] Professor Bayefsky continues:

> These conclusions appear to leave open the possibility that the injection of demeaning sexual stereotypes into the work environment by way of comments or jokes which are not directed to the complainant may be of such nature and degree as to constitute harassment within the meaning of sections 9(1) and 6(2).

The fourth criteria - "known or ought reasonably to be known" is more difficult to define. As Chairperson Bayefsky asks in Cuff, whose perspective governs? Victims are normally women in positions of relative weakness, while perpetrators are generally males in positions of relative power. Because of an ingrained history of gender oppression in the workplace, a certain level of oppression may be acceptable to those in control, and perhaps as well, to those who must acclimatize to it. While the precise nature of the test is not clear, it is certainly met if the

victim makes it clear to the perpetrator that the behaviour is not welcome. In Cuff, Chairperson Bayefsky says at D/3981:

> Comment or conduct "that is known or ought reasonably to be known to be unwelcome" imports an objective element into the definition of harassment. The fact that this particular complainant found the behaviour vexatious is not sufficient. Respondents either must have known, or they ought reasonably to have known, the behaviour to be unwelcome.
>
> ...
>
> A complainant who clearly indicates to the respondent that his actions were unwelcome will more likely be able to satisfy the condition that the respondent knew the behaviour was unwelcome.

I would add that any clear indication that the behaviour is unwanted should satisfy the test of "ought reasonably to know", unless perhaps if the rejection is contradicted, to the extent that it is believable. It is clear that continuing willingness to work has no bearing on this test. Chairperson Shime established this in Bell at D/157:

> The willingness to work is of no moment because persons in need of employment may be prepared to endure certain humiliations because of their financial need.

It is therefore for me to determine whether the actions of the Respondents in this Inquiry fall within the provisions of sections 6(2) or (3) (b) as defined within the developing jurisprudence.

The Evidence:

Ms. Darlene Noffke came to work for the Respondents pursuant to an Ontario government "FUTURES" programme funded by the Department of Ministry of Skills Development. Mr. Thomas Malloy testified that, in his capacity as a Youth Employment Counsellor at Loyalist College, Bancroft, he interviewed Ms. Noffke for the FUTURES programme on December 5th, 1985. Ms. Noffke was found to be eligible for the programme as she was an unemployed youth who had completed her Grade 12 education. At the time of the initial interview, Mr. Malloy recommended that the Complainant be accepted to the FUTURES programme and be provided with an appropriate subsidized employment placement. He noted on the Intake Assessment Summary (Exhibit 12) that he found Ms. Noffke to have poor job search skills; to be personable; and to be a person who was both shy and with low self-esteem. It was his belief that FUTURES would assist Ms. Noffke to become employable by providing her with on-the-job training as well as with employment experience.

Ms. Noffke was placed by FUTURES with the Respondents in April 1986. Donald McClaskin had applied in writing to FUTURES for a nursery worker to work at the McClaskin Hot House, R.R. #2, Combermere, on January 22nd, 1986. The position involved planting, maintaining, and selling of plants as well as maintaining the grounds of the nursery. This application indicates the Respondents were prepared to have a full-time trainee from the FUTURES programme on the understanding that if

the participant's performance was "satisfactory, upon completion of the placement" that his "organization was prepared to hire the individual." (Exhibit 13) This application also contains the statement in Mr. McClaskin's hand-writing that "this job is better for a girl."

Ms. Holly Watson Masters testified that Ms. Noffke was her client at Loyalist College and that she had completed arrangements for the placement with the Respondents. She had discussed the position with Mr. McClaskin after his application was received to clarify the training that would be available if a FUTURES placement was made at his greenhouses. Ultimately, Ms. Noffke was placed by the Loyalist College FUTURES Centre for 16 weeks at McClaskin Hot House, commencing on April 7th, 1986. She was to work approximately forty hours per week and to be paid minimum wage by FUTURES. Ms. Noffke signed a Client Participation Agreement, for the Work Experience Placement, and Mr. McClaskin signed an Employer Training Agreement. Both these agreements were "standard form" agreements as provided by FUTURES. (Exhibits 4 and 14)

Ms. Noffke's duties while employed by the Respondents included watering plants, transplanting, planting seeds, selling plants to customers and cutting the grass of the Respondent's property. She worked eight to nine hours each day and on no occasion, other than her last day, was she given less than eight hours of work. (Evidence I:25-26). The FUTURES programme required employers to report on the progress of placements and

Mr. McClaskin prepared one report on Ms. Noffke's progress which was dated May 3, 1986 and was generally very positive. (Exhibit 5) Mr. McClaskin stated that Ms. Noffke "follows most routines well without reminders; can always be depended upon in any situation at work; that her dress, neatness and manners were good for this kind of work; her attendance was regular and she was always on time." He further stated that "she was very enthusiastic and shows high interest in the job; listens to criticism of the supervisor; wants to learn more; and the she is very pleasant and helpful - works well with others." With respect to her job skills, Ms. Noffke was given the highest ranking of "very good" and similarly the highest ranking for quality of work: "finishes every task very well and makes few mistakes, if any." With respect to quantity of work the ranking was marked "does more work than expected of other trainees". The only reservation expressed was with respect to continuing to employ Ms. Noffke where "too soon to assess" was marked.

Ms. Noffke testified that from the outset of her employment, the Respondent, Donald McClaskin, made sexual suggestions to her, indicating that he was tired of his wife and that there would be financial benefits to her if she was responsive to his sexual advances. He told her that:

> he was sick of his wife and he needed satisfaction with another woman. And he would talk about children's curiosity about sex and how he liked to touch children. And towards the end of April he started to grab my behind. I made it clear to him not to be doing this. (Evidence I: 20-21)

The Complainant recalled that most of the sexual advances were made in the greenhouses and that during the first part of May the Respondent, Donald McClaskin, offered to reduce the cost of the work on her fiance's car which was being repaired at his body shop, situated adjacent to the hot houses. She testified:

> Well, he offered me money then, the first part of May, to reduce the price of Darrell's car to get it painted.
> ... Well, he wanted to go to bed with me and that's why he offered the money. ... Because he said he wanted to go to bed with me.(Evidence I: 22)

Although there were various attempts at physical contact during April and May, the Complainant recalled that the situation worsened on June 10th. Ms. Noffke testified that she was cutting the grass when Donald McClaskin approached her and stated: "I know what's wrong with you, you're scared you're going to like it" (Evidence I:22). Ms. Noffke interpreted "it" as meaning "going to bed". The Complainant testified that Mr. McClaskin then put his arm around her and grabbed one of her breasts which angered Ms. Noffke and she recalled pushing him away. Later the same day, Mr. McClaskin approached her again and told her that he wanted her body and invited her to his apartment. Ms. Noffke further testified that the Respondent indicated that if she resisted, he would carry her to the apartment and "after he got my pants down it would be too late" (Evidence I:22). She was instructed to wear a dress to work the next day.

Ms. Noffke testified that when she appeared on June 11th in her working clothes, Donald McClaskin was angry and told her that

she and her fiance were just "asking for favours and when it came time to ask for a favour he wasn't good enough". (Evidence I: 22-23) When Ms. Noffke finished with her chores around 11:30 in the morning on June 11th and inquired about more work, she was informed by Mr. McClaskin that she was finished for the day. "And he said if I want strictly business that's what I would get." (Evidence I: 23) Ms. Noffke went home around noon and for the first time discussed the situation at work with her fiance, at which time they decided to call the police who interviewed both parties to this Complaint. Ms. Noffke also discussed her employment and her concerns about the behaviour of Mr. McClaskin with a counsellor at the FUTURES programme as well as with the Rape Crisis Centre in Peterborough. Ms. Noffke did not return to work at the Respondent's greenhouses after June 11, 1986. She was subsequently employed during the summer of 1986, through the FUTURE'S programme at Lake St. Peter Provincial Park, by the Ministry of Natural Resources.

Mr. Donald Carl McClaskin, the personal Respondent, and owner of McClaskin Hot House testified as to his recollections of the Complainant's employment. Mr. McClaskin is 55 years of age and operates a greenhouse and body shop business in the Purdy, Maple Leaf Area, outside Bancroft. Mr. McClaskin strongly denies that he touched or physically interfered with Darlene Noffke. He acknowledged that he might have had occasion to physically touch her during his work:

> Well, sometimes by the hand or the shoulder.
> I might even, when she'd be in the paint shop

> or something give her a pat on the ass and tell her to get back to work. (Evidence II:87)

Mr. McClaskin specifically recalled the events leading up to his requesting a birthday kiss which he acknowledges Ms. Noffke was reluctant to provide:

> I had given her work to do, got Dale working, and then I was doing a few odds and ends and then I went over to Darlene and told her it was my birthday today and a man should have a kiss on the cheek at least for a birthday. So she hesitated a minute and I say "Oh, come on, there's no harm on giving a man a kiss on the cheek for his birthday." So she gave me a kiss. It was over with. I didn't find anything wrong with it in one respect or the other. (Evidence II:92)

In cross-examination, Mr. McClaskin reiterated that he had asked Ms. Noffke for a kiss on his birthday on April 26th and that he saw nothing wrong with a birthday kiss. He further agreed that April 26th, 1986 was a Saturday and that Ms. Noffke was not at work. Mr. McClaskin attempted to explain this discrepancy by stating:

> So, maybe it was a Friday I asked her for it, being she wouldn't be there Saturday. (Evidence II:159)

Mr. McClaskin was asked whether he had talked about children's curiosity with sex and how they liked to touch each other. He recalled talking about kids but specifically denied talking about sex and children and stated that Ms. Noffke had got his remarks twisted:

> ..but we got talking about kids, and I said that kids were always curious, asking, why, when, how and so forth, and where she got it twisted it around so much like this,

I don't know. (Evidence II:94)

Mr. McClaskin also specifically denied discussing his wife with Ms. Noffke or making a statement indicating that he needed the satisfaction of another woman:

> You all seen my wife this morning. There's a woman, one in a million. She does more than her share of work around any place. I would never say anything like that against my wife because they're hard to come by. (Evidence II:96)

Mr. McClaskin specifically denied that he has suggested reducing the cost of the body work to Darrell Fleguel - Ms. Noffke's fiance. Rather, he complained that it took considerable time for him to collect the outstanding account.

The Inquiry heard evidence from both Ms. Noffke and Mr. McClaskin about the events of the final day of employment - June 11th, 1986. There is no dispute over the fact that Mr. McClaskin told Ms. Noffke that she was not needed that afternoon. Mr. McClaskin explains his actions on two distinct grounds: that he was concerned about the black flies in the back of the property where he states Ms. Noffke would have had to work. He testified that:

> ... we were both in good humour. She knows it. We were in good humour. We talked a bit like that and I just told her that I had nothing for the afternoon except garden work and it was just too bad to send her back there. So I said "You might as well go home at noon and I'll see you tomorrow" and I made the card out. (Evidence II:107)

Mr. McClaskin's second explanation for sending Ms. Noffke home early was that there was nothing for Ms. Noffke to do, except

work in the back garden and therefore she didn't need to work in the afternoon. (Evidence II:104) As well, it must be noted that Mr. McClaskin testified that the greenhouse was generally quite busy during the first two weeks in June:

> In April it is slow. There's only people coming in for perennial plants. About the middle of May, now you're getting into a lot of traffic, and the first two weeks of June is unbelievable, because you can really get busy. There's traffic coming in both ways in the lane way and sometimes they'd have to park in behind the garage. (Evidence II:113)

Considerable emphasis was placed by counsel for the Respondents on the role that the Complainant's fiance, Mr. Darrell Fleguel, played in launching these proceedings. Mr. Fleguel was not called as a witness by either party so I was unable to observe his demeanour under oath. Nonetheless, it is my impression that although Ms. Noffke is a quiet and seemingly timid person, she is an honest person who has been supported by her friends and fiance throughout these lengthy proceedings. I specifically find that there was no evidence on which I could find that Mr. Fleguel or Ms. Noffke have acted improperly in terms of the bringing of this Complaint or with respect to the issues to be determined by this Inquiry. (It is not necessary for me to comment further on the question of Mr. Fleguel's character or integrity as these matters are not relevant to my determination of the matters in issue.)

The Complainant's recollection of her employment with the Respondents is strengthened by the testimony of Constable Eric

Johnson of the Ontario Provincial Police, Bancroft Detachment, who interviewed Ms. Noffke on June 11th, as well as Ms. Holly Masters, of Loyalist College, who met with her on June 12th, 1986. In light of the length of time since these events took place and the significant discrepencies between the testimony of the major actors in this Inquiry, I place considerable weight on the evidence and detailed notes of these two disinterested witnesses. I would specifically note that they both recalled Ms. Noffke portraying her experiences while employed by Mr. McClaskin in similar terms. As well they indicated the distress and embarrassment of the Complainant. Ms. Masters stated that:

> I met with her alone. Tom had to go in the other room because she was very upset, crying, humiliated. She was very embarrassed to tell me this, very reluctant to tell me, even at this point. (Evidence I:150)

Constable Johnson has been with the O.P.P. for twelve years and in Bancroft for five years. He testified that after interviewing Ms. Noffke and taking a statement from her, he believed Ms. Noffke's version of the incidents during her employment with Respondent and recommended that criminal charges be laid against Donald McClaskin. I would add that counsel for the Respondent noted that Constable Johnson was the most unbiased of all the disinterested witnesses. I would agree that Constable Johnson was a highly credible witness. Constable Johnson attended at the home of Darlene Noffke and her fiance, Darrell Fleguel, on Wednesday, June 11th, 1986 around 1:15 p.m. and learned at that time about Ms. Noffke's recent employment

experiences. He recalled that Ms. Noffke was visibly upset -- it appeared like she was about to cry. Her eyes were swelled up.

> and her voice was ---her voice was shaky. She appeared nervous." (Evidence I:96)

Constable Johnson's notes were admitted as evidence and are helpful in understanding the atmosphere in which Ms. Noffke was working:

> In April he started to hint around to have sex with me by asking me personal questions like whether or not I am on birth control, how many boyfriends I had. He asked me if had sex and like sex, how old I was my first time I had it, etc.
>
> I refused to answer the questions and became very embarrassed. He kept this verbal sexual harassment (sic) just about on a daily basis. Around the beginning of May he told me I had a nice body and suggested we go into this apartment on the property and 'make love'. I said no I don't do stuff like that. He said I know what your problem is - you're scared you're gonna like it.
>
> I just walked away and continued working. He left me alone the rest of the day. This kind of harassment continued on a daily basis and sometimes while I was working he would come up behind me and grab me on the rear end and squeeze. I would raise my hand to slap him and get upset and he would back away and laugh. I told him not do it anymore. Around the middle of May he grabbed me in the hot house around the shoulder in a strong hold and tried to kiss me. I tried to push my way out of it and told him to let go. He let me go and started to talk about rape, and if I charged him his lawyer would make it look like I enticed him and make me look bad. I was scared of his suggestions and took it as a threat so I did not pursue that matter. This was on a Friday and he had been drinking but did not appear drunk but displayed some effects of alcohol consumption. On the following Monday I went to work and nothing happened that day I don't think but soon after it started up again. He would talk dirty and make more suggestions that we have sex.

....

> On Thursday the 8 of May while working the hot house he came up to me and asked me for a birthday kiss. I said no, and he said in my family everyone has to give him a kiss. He left and then came back in a little while later and grabbed me and pinned me up a wall and said what are you going to do about it now. I struggled to get away and asked him to let me go, but he kept trying to kiss me. I would turn my head back and forth to avoid him.
>
> He finally let me go and walked away without saying anything. The following two weeks he left me alone because my boyfriend was working for him part time but he continued to talk dirty by saying that I should have sex with him because he needs the satisfaction and he was tired of his wife. I would try to put him off by saying I'm not that kind of girl. He said that no one would ever know. He was persistent with this kind of talk on a daily basis. For the next 3 weeks. (Evidence I:80-86, Exhibit 8)

Constable Johnson confirmed Ms. Noffke's testimony with respect to the events of June 10th 11th 1986. As well, he asked Ms. Noffke "why did you let it go so far before reporting him or quitting to work there?" His notes indicate that she replied "I was afraid of him hurting me or trying to ruin my reputation." He recalled that Ms. Noffke was visibly upset when he interviewed her and he felt no reason not to believe what she was saying. (Evidence I:87)

On the same date that Constable Johnson interviewed the Complainant, he also interviewed the Respondent around 4:00 p.m. Exhibit 9 is a Cautioned Statement of Donald McClaskin given to Constable Johnson. In this statement Mr. McClaskin denies bothering Ms. Noffke and states that he "sent her home because there was no work." He further stated that he believed that the allegations of Ms. Noffke had arisen because he had been trying

to obtain payment of the $248 owing on her fiance's car. He denied ever having any physical contact with the Complainant except on his birthday when she gave him a kiss on his cheek. Mr. McClaskin further stated:

> I have never touched her on the privates at all. I have been warned not to hire her, as she was nothing but trouble. I don't think I should say anything more until I speak to my lawyer as I may have to counter-sue her (or) something. (Evidence I:91)

In both her Intake Questionnaire as well as her formal Complaint, (Exhibits 2 and 7), Ms. Noffke states that, from the early days of her employment, Donald McClaskin made sexually suggestive comments to her and discussed how children are curious about sex and how they like to touch each other and he liked to touch them. Her Complaint further states that toward the end of April, 1986, Mr. McClaskin began to grab her behind and that, although she made it clear to him that she did not want him to do this and asked that she be left alone, the Respondent continued his sexually aggressive behaviour.

Ms. Noffke testified and stated in her Complaint and in the Intake Questionnaire that during May, 1986, Mr. McClaskin continued to make sexual advances. She specifically recalled that in late May, Mr. McClaskin asked her for a birthday kiss and that when she resisted that he put his hands on either side of her and prevented her from moving away. (Exhibit 2, paragraph 7.) The Complainant's feelings are summarized in the Complaint where she states:

During all the time I worked for Mr. McClaskin he made it clear to me that he wanted to go to bed with me. He continually said he wanted my body, he was sick of his wife and needed the satisfaction of another woman. He persistently grabbed my behind and talked dirty. I always made it clear to him that I wanted nothing to do with him.

Decision:

Sexual harassment and its significance in the workplace has only recently been recognized by legal thinkers and by the Ontario Legislature. I have written in an earlier decision, Graesser v. Porto (1963), 4 C.H.R.R. D/1569, about the difficult role of a decision-maker in an Inquiry pursuant to the Code in determining an issue of sexual harassment:

> Rarely will one harass another in full public view. Rather, these events usually take place behind closed doors or with no witnesses present. Such being the case, if similar fact evidence were excluded, the trier of fact would be faced with having to decide an issue solely on the evidence of the parties before him (at D/1572).

There was no similar fact evidence introduced in this Inquiry. There was no testimony from any person who had any connection with the workplace environment other than the Complainant, the named Respondent and the Respondent's wife. It is therefore for me to determine whether the Complainant has brought herself within the provisions of either or both of the two sections of the Code upon which her Complaint relies.

As stated earlier, subsection 6(2) has codified the spirit of the poisoned work environment or discriminatory condition of employment jurisprudence while introducing a number of requirements which must be satisfied in order to find that an employee has been the subject of "harassment" as defined in

subsection 9(f). First, has there been a "course of" behaviour and not merely a single event. I accept the evidence of the Complainant that during the months of April and May 1986, she was subjected to ongoing discussion of sexual matters and that on various occasions the Respondent McClaskin indicated his interest in having physical and sexual contact and relations with her. Clearly the alleged behaviour of Donald McClaskin was not limited to only one occasion or to the events of June 10th and 11th.

Secondly, I must determine if the Respondent's advances were considered behaviour that was "vexatious", "annoying", or "distressing". In my opinion, the Complainant indicated to the Respondent on numerous occasions that she was troubled and agitated by his attempts at physical contact. Yet, he persisted in trying to get some attention from her - even claiming his entitlement to a birthday kiss in face of the Complainant's clear opposition which he acknowledged. I find that the Complainant, Ms. Noffke, is very similar to the Complainant in Hall v. Sonap Canada (at page 25), where Chairperson Plaut recognized the subjective aspect of "vexatious" when considering "a young, inexperienced and somewhat shy complainant who finds herself in a situation of innuendos and physical contact with a man who is older, is her boss ...". I have accepted the fact that Ms. Noffke felt uncomfortable and I also find that she was generally intimidated by the Respondent, in whose employ she had been placed by a provincial government programme in order to

develop her employment skills. I therefore find that the Respondent's conduct meets the "vexatious" test.

The third aspect of the test is whether the Complainant has demonstrated that there was either "comment or conduct" which gives rise to harassment. As I have already indicated I accept the testimony of the Complainant that actions and words of the Respondent during the course of her employment clearly bring his actions within the meaning of "comment or conduct".

As stated earlier, the fourth criteria - "known or ought reasonably to be known" is more difficult to define. The question that I must address is the extent to which Ms. Noffke made it clear to Mr. McClaskin that his behaviour was not acceptable. This question requires me to determine whether I believe the evidence of the Complainant with respect to the events that transpired during the course of her placement with the Respondents. I find that Ms. Noffke gave her evidence in an honest and straightforward fashion. Although there were some details that she did not recall, her evidence is substantiated by the evidence of the witnesses to whom she spoke after the events in question. I therefore accept her evidence as to the advances of Mr. McClaskin. I find that she indicated to him on numerous occasions that she was not interested in any physical or sexual contact with him. I specifically find that she clearly indicated to the Respondent that his actions were unwelcome and that he ought reasonably to have known that his comments and conduct were

troubling to the young woman who had been placed with him by the FUTURES program.

Mr. McClaskin's evidence as to the birthday kiss and his recognition that he was "at least" entitled to a kiss on his birthday further convinces me that there was both a course of conduct and a recognition that it was not appreciated by Ms. Noffke. I therefore find that the Complainant has brought herself within the provisions of section 6(2) of the Code.

It remains for me to determine whether the Complainant has brought herself within section 6(3) of the Code. This section clearly states that prohibited conduct includes a reprisal or threat of reprisal for the rejection of a sexual solicitation or advance by an employer. I have no difficulty in finding that the Respondent's behaviour on the last day of the Complainant's employment was clearly an act of reprisal for the rejection of his sexual solicitations of the Complainant. In my opinion, there is no basis to the Respondent's testimony that he sent Ms. Noffke home at noon because of the lack of work and the presence of bugs. The Respondent testified that the first two weeks of June are extremely busy, yet he determined that he had nothing for Ms. Noffke to do after June 11th, 1986 except to work in a swampy area. He also decided that the bugs were so extreme on that date that she could not work despite the fact that she had worked without a day's absence since she commenced her employment in early April. I therefore find that the only plausible explanation for his behaviour is that he was acting vindictively

in face of the rejection by Ms. Noffke. I therefore find that Mr. McClaskin, both personally and in his capacity as the proprietor of McClaskin Greenhouses, contravened section 6(3)(b) of the Code.

Remedies:

Counsel for the Complainants have asked for special damages in the amount of $240.00 being the last week of wages between Ms. Noffke's employment with the Respondents and her second FUTURES placement on June 23rd, 1986. These sixty hours also include twenty hours for the one-half week's work after she did not return to McClaskin Greenhouses on June 11th. In light of my previous findings that the Respondents have contravened both sections 6(2) and 6(3)(b), and thereby contravened section 8 of the Code, I find that the $240.00 is a reasonable and appropriate award for special damages.

GENERAL DAMAGES: The Code provides for compensating the offended person for mental anguish where the "infringement has been engaged in wilfully or recklessly". In the decision of Graesser v. Porto, I discuss the recent development of the scope and purposes of damages:

> The case of Torres v. Royalty Kitchenware engages in a lengthy discussion of the scope and purpose of damages (pp.24-42). What becomes apparent upon reading this passage is that in awarding damages, the trend has shifted from awarding such damages as a

> punitive measure, to awarding the damages as a form of compensation to the complainant. So too, has a principal emerged that the complainant, in addition to being entitled to damages based on specific damages such as lost earnings, is also entitled to general damages based on psychological damages, mental distress and the like.

Graesser v. Porto enumerates the factors considered in awarding general damages. While the list is not exhaustive, it is a guide in establishing relevant factors:

> (a) The nature of the harassment, that is; was it simply verbal or physical as well;
> (b) The degree of aggressiveness and the physical contact in the harassment;
> (c) The ongoing nature, that is, the time period of the harassment;
> (d) The frequency of the harassment;
> (e) The age of the victim;
> (f) The vulnerability of the victim;
> (g) The psychological impact of the harassment upon the victim.

After reviewing these criteria, counsel for the Complainant suggested that in this case the remedy for an award of general damages should be significant and recommended $5,000.00 as well as prejudgment interest of 11%. In the alternative, counsel for the Complainant suggested that I consider the reasoning of Professor Hubbard in Morgoch v. City of Ottawa, unreported, Ontario Board of Inquiry, 1989. He awarded no interest on the basis that the amount of general damages was meant to reflect injuries suffered to date. Counsel for the Respondents has argued that I must carefully consider how we quantify general damages, if they are viewed as appropriate. He emphasized the fact that Ms. Noffke was back in the FUTURES programme in 10 to

12 days, working for the Ministry of Natural Resources. He further argued that she had not been dragged away from a career that she had for years and/or from a job that she loved. Respondents' counsel suggested that the transition between positions within the FUTURES programmes was quite smooth and that Ms. Noffke did not suffer very much at all. He suggested that if I were to make an award of damages, an appropriate figure would be $2,500.00.

I have given the question of damages considerable thought. I note that Chairperson Plaut in Hall v. Sonap Canada awarded $1,500 in a situation where it was the Complainant's first employment. Although the Respondent in that case did not at any time suggest intimate involvement, he made her constantly uncomfortable and put her under serious pressure.

I have found that the circumstances of the present case are more serious than in the Hall decision and closer to the situation in Green and Swan - Sheehan v. Safieh and 709637 Ontario Inc., carrying on business as City Auto Recyclers (1988) 9 C.H.R.R. D/4749, where the Inquiry was also chaired by Chairperson Plaut. In the latter case, it was found that the Respondent had engaged in physical and verbal sexual harassment and that the Complainants were subject to repeated sexually suggestive and offensive remarks, advances and unwanted touching causing emotional and nervous distress. The Board of Inquiry awarded $3,000 in general damages plus interest to one Complainant and $1500.00 plus interest to the other Complainant.

I have concluded that the harassment of the Respondent McClaskin was wilfully engaged in and that I am therefore in a position to make an award for mental anguish. I find that throughout her employment with the Respondents, Ms. Darlene Noffke was subjected to comments and physical contact which amounted to sexual harassment. This harassment was particularly difficult for a young woman in her first employment creating anxiety and distress both while employed by the Respondent and for a period of time after she left the Respondent's employ. She discussed his actions and comments with both her counsellor at the FUTURES programme and with a counsellor at the Peterborough Rape Counselling Centre after she left McClaskin Greenhouses. Although she found work soon after leaving the Respondent's employ, I find that $2750.00 is appropriate figure for mental anxiety up to the date of the Inquiry. I therefore do not award any amount for interest.

ORDER

McClaskin Hot House and Donald Carl McClaskin are jointly and severally ordered to:

(a) Post, within one month of receiving this Order, the Preamble and sections 1, 6 and 8 of the Ontario Human Rights Code on the firm's premises and to keep them in full sight;

(b) to inform the Commission, for a period of two years, of the termination record of female employees, so that the work environment of McClaskin Hot House may be monitored;

(c) to pay Darlene Noffke the sum of $2,990 (twenty-nine hundred and ninety dollars).[1]

The sum of $2990 is due on or before January 20th, 1990, after which date it will attract interest. Until the payment is made, I shall remain seized of the matter and will reserve jurisdiction for two years with regard to order (b) set out above.

Toronto, Ontario, December 20th, 1989.

Frederick H. Zemans

Board of Inquiry

---

1. This figure is calculated on the basis of $240.00 for lost wages and $2750 for general damages to the date of the hearing.